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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1037

HUDSON COUNTY NEWS COMPANY, INC., a domestic corporation,

Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,

Defendants-Respondents.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

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Defendants-Respondents.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

Appellant appeals from the final decree of the Supreme Court of New Jersey entered on December 2, 1963. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal constitutional questions are presented.

Opinions Below.

The opinion of Justice Jacobs of the Supreme Court of New Jersey is not reported. A copy of that opinion is annexed hereto as Appendix A. The opinion of Justice Ralph L. Fusco of the Superior Court of New Jersey is not reported. A copy of that opinion is annexed hereto as Appendix B.

Jurisdiction.

On February 8, 1963, Appellant, a wholesale distributor of newspapers, books and magazines in the State of New Jersey, filed a petition to the Superior Court of New Jersey for a declaratory judgment pursuant to N. J. S. A. 2A: 16-60. In that petition Appellant prayed for judgment as follows:

A. Declaring that 1962 New Jersey Pamphlet Laws Chapter 174 violates the First and Fifth Amendments and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. Enjoining and restraining Appellees from enforcing 1962 New Jersey Pamphlet Laws Chapter 174.

After a hearing in the Superior Court of New Jersey before Justice Ralph L. Fusco, which became a Motion for Summary Judgment by stipulation of the parties, and the rendition by said Justice of his opinion (Appendix B) a decree was entered on March 14, 1963 in said Superior Court. A copy of said decree is annexed hereto as Appendix C.

Said decree in substance held that 1962 New Jersey Pamphlet Laws, Chapter 174, is deemed constitutional.

Appellant appealed from the aforesaid decree to the Superior Court, Appellate Division. Said appeal was cer-

tified to the Supreme Court of New Jersey, on its own notion.

The Supreme Court of New Jersey, in its opinion on said appeal, affirmed the decision of the lower Court, and on December 2, 1963, entered a final decree. A copy of said decree is annexed hereto as Appendix D.

The notice of appeal to the Supreme Court of the United States from such final decree was filed in the Supreme Court of New Jersey on February 27, 1964.

The statutory provision conferring on the Supreme Court of the United States jurisdiction of this appeal is Title 28, United States Code, Section 1257(2).

The following decisions sustain the jurisdiction of this Court to review the decree on this appeal. *Bantam Books* v. *Sullivan*, 372 U. S. 58 (1963); *Smith* v. *California*, 361 U. S. 147 (1959); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Burstyn* v. *Wilson*, 343 U. S. 495 (1952); *Winters* v. *New York*, 333 U. S. 507 (1948).

Statute Involved.

The statute here involved is 1962 New Jersey Pamphlet Laws, Chapter 174, which reads as follows:

> "A Supplement to 'An act concerning the sale and distribution of newspapers, magazines and other publications in certain cases, and supplementing subtitle 10 of Title 2A of the New Jersey Statutes,' approved June 7, 1955 (P. L. 19, 5 c. 48).
>
> Be it enacted by the Senate and General Assembly of the State of New Jersey:
>
> 1. No person, firm or corporation engaged in the business of distribution of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer not to send or

deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication.

2. Any person, firm or corporation which fails to comply with the provisions of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500.00 or imprisonment for 30 days or both."

Questions Presented.

1. Does 1962 New Jersey Pamphlet Laws Chapter 174 tend to inhibit the distribution of books and magazines in New Jersey in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Does 1962 New Jersey Pamphlet Laws Chapter 174 constitute an arbitrary and unreasonable distinction between newspaper distribution and the distribution of any book, magazine or other publication, in violation of the guarantee of equal protection of the laws, of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Does 1962 New Jersey Pamphlet Laws Chapter 174 impose an arbitrary and oppressive restraint on the lawful business of book and magazine distribution in New Jersey, in deprivation of liberty and property without due process

of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

Statement.

The Federal constitutional questions sought to be reviewed were raised in the Complaint filed by Appellant in the Superior Court of New Jersey, as set forth more particularly at p. 1 hereinabove. The issues were raised in the Superior Court and again in the Supreme Court of New Jersey as appears from the opinion of that Court (Appendix A). Therefore, this appeal is from a final decree sustaining the constitutionality of a Statute of the State of New Jersey against Appellant's contention that such statute violated Appellant's rights as guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Statement of Facts.

Plaintiff (hereinafter referred to as "Hudson") is a company engaged in the wholesale distribution of newspapers, books and magazines to approximately 1,500 retail dealers in Hudson and Essex Counties in the State of New Jersey (P64a-19; P67a-10).*

In addition to distributing most of the major New Jersey and New York City newspapers, Hudson annually distributes more than 750 different paperback book titles and magazines, including Saturday Evening Post, Life, Time, Look, and Reader's Digest (P67a-10). Hudson receives copies of these magazines and books from national distributors representing the various publishers, and each week dis-

* P64a-10 refers to page 64, folio 10 of Plaintiff-Appellant's Record Appendix.

tributes hundreds of different titles to the 1500 retail dealers in its large area of distribution.

In distributing this tremendous variety and volume of publications to the mass market, a certain number of unwanted publications are, on occasion, inadvertently delivered to retail dealers because of the huge number and diversity of titles handled (P67a-30; P74a-20). Moreover, the severe and stringent time limitations inherent in the processing and delivery of dated publications, and the failure to receive timely notice prior to the completion of the makeup, bundling and delivery arrangements also invariably result in some deliveries of publications not wanted, for one reason or another, by a particular individual dealer. These are customarily returned on *weekly pickups* which Hudson makes primarily for the return of unsold publications (P68a-40).

With respect to new publications, the system of distribution does not materially differ. Initially, Hudson distributes such publications in accordance with the circulation instructions of the national distributor or publisher. The dealer, however, can return such publications under the same weekly pickup arrangement without suffering any economic detriment. Moreover, if he at any time notifies Hudson not to send a particular publication to him, Hudson makes every reasonable effort to see to it that such publication is not sent (P67a-20). It is obviously economically unsound for Hudson to deliver publications which it knows will be returned, especially since Hudson bears the delivery, handling, pickup, administrative and bookkeeping expenses of such returns (P75a-10).

The prevailing distribution system thus enables a broad cross section and diversity of publications to reach the dealer, while at the same time the dealer remains free to display and offer for sale whatever publications he wishes.

This is especially important in the case of new publications. Publishing is not a static enterprise. New publishers constantly enter the field with new periodicals, and old publishers put out new titles. The initial effort and expense to build up circulation must, to a large extent, be directed to newsstand sales, and is generally on a trial basis, dependent upon whether or not a publication wins public acceptance.

Since the retailer dealer is not equipped to read and evaluate the large volume of publications offered to the distributor, the distributor must make the initial decision as to whether or not to carry the new item. Based on records of past sales of similar publications he must also determine the size of the order and the division of that order among the hundreds of retail dealers.

The Statute and Its Background.

On December 3, 1962, the legislature of New Jersey enacted a statute designated as 1962 New Jersey Pamphlet Laws, Chapter 174, which is set forth at page 3, *supra*, and, in pertinent part, provides that:

> (1) No distributor of publications shall deliver any publication to a retail dealer, after receiving written notice not to deliver such publication.
>
> (2) Any distributor who fails to comply with (1) above, shall on notice remove such publication from the retail dealer's possession; any distributor failing to do so within two business days shall be a disorderly person, subject to a fine of not less than $500.00 or imprisonment for 30 days or both.

This statute is an amendment of Assembly Bill No. 492 (P83a-20 to P84a-20), which was recommended, verbatim

by *The Commission to Study Obscenity in Certain Publications* (see Final Report of the Commission P33a-20 to P62a-30; and recommended Bill at P61-10 to P62a-30). Assembly Bill No. 492 was passed in 1962 by the legislature and vetoed by the Governor because of its doubtful constitutionality (P92-10). Amendments (P83a-20 to P89a-20) such as an exemption for newspapers, were made and the statute was enacted as 1962 N. J. P. L. 174; which is substantially as presented by *The Commission to Study Obscenity in Certain Publications.*

Some time subsequent to the enactment of 1962 N. J. P. L. Ch. 174, the Hudson County Prosecutor's office sent a printed announcement to Hudson inviting it to attend "a conference of the clergy, laity representatives, retail dealers and distributors relative to the new laws of the State of New Jersey concerning *obscene* publications and the sale and distribution of all magazines and publications." (See letter annexed to affidavit of L. Vaughn Swanwick, P76a.)

This "conference" was attended by members of various private organizations seeking to restrict the distribution of diverse publications. Harold J. Ruvoldt, Deputy Attorney General of New Jersey, Hudson County Division to Deter and Eliminate Obscene Literature, outlined the provisions of 1962 N. J. P. L. Ch. 174 and both he and Deputy Attorney General Frank A. Verga, Acting Prosecutor of Hudson County, announced the intention of the Prosecutor's Office to enforce the statute (P66a-10; P73a-20).

Representatives of the "National Organization for Decent Literature" (commonly referred to as N. O. D. L.), (now known as National Office for Decent Literature) who attended this meeting advised the gathering that form letters embodying the notice requirements of the statute

would be prepared by their organization and distributed to retail dealers. The N. O. D. L. further urged retailers to send such notices to the distributors, together with the N. O. D. L. list of "objectionable" publications (P73a-20).

On January 29, 1963, a meeting was held at the Hudson County Prosecutor's Office, attended by representatives of Hudson, at which time the Prosecutor's Office again expressed the intention of proceeding with the enforcement of the statute and forthwith prosecuting any alleged violations by plaintiff or others in Hudson County (P66a-20; P73a-40).

On January 16, 1963, William S. Family, Chief of Police of the City of East Orange, Essex County, circulated a letter to "all Newsdealers of East Orange" in which he requested their cooperation in connection with the prosecution of violations of the newly-enacted provisions of 1962 N. J. P. L., Ch. 174, dealing with "objectionable reading material" (P77a; P66a-30).

Since the enactment of 1962 N. J. P. L., Ch. 174, Hudson has received a number of written notices which would require it to pick up and not to deliver various magazines and other publications in accordance with the specific provisions of the statute and which would subject it to the criminal penalties embodied therein for any failure to comply (P79a; P66a-40).

The Federal Questions Here Presented Are Substantial.

A. 1962 N. J. P. L. 174 Restrains Distribution of Literature in New Jersey.

The great volume of publications delivered by Appellant under the pressure of stringent time limitations to approximately 1500 dealers makes inevitable numerous misdeliver-

ies, including unwanted items. The requirement of the statute in question, that such publications be picked up within two (2) business days after notice, would require Appellant and all other distributors to purchase additional trucks and hire additional drivers at a very substantial cost (P74a, 75a). Appellant has stated unequivocally that such increased cost would make it necessary to discontinue the distribution of numerous books and magazines (P75a). These facts were not contested by Appellees (P-5a). Similarly, modification of Appellant's business methods to insure against misdelivery would involve substantial cost which, in turn, would result in discontinuing the distribution of "marginal", less profitable publications. There is no other alternative as the distributor is prevented from passing the increased cost on to the public because the publications bear a cover retail price.

This restriction is no less dangerous to free speech because it is indirect. As this Court has stated, "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books* v. *Sullivan*, 372 U. S. 58, 66 (1963). Any other position would sanction the whittling away of the freedom of the press.

B. 1962 N. J. P. L. 174 Unreasonably Restricts Freedom of the Press.

The Fourteenth Amendment protects freedom of the press and speech from infringement by State action, *Smith* v. *California*, 361 U. S. 147, 150 (1959), and the Courts have long recognized that freedom of distribution is an integral part of freedom of the press. *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938). The restraints of 1962 N. J. P. L. 174 must be carefully examined against this background.

Restriction of the free dissemination of publications, can be justified only by a "clear and present danger" to the public welfare. *Schenk* v. *United States*, 249 U. S. 46, 52 (1919). The Supreme Court of New Jersey in the case at bar held that the restraint resulting from 1962 N. J. P. L. 174 was necessary to combat the following evils:

> (a) The distribution of obscene literature (D-5)*;
>
> (b) the fire hazards involved in storing unwanted materials (D-6, 7);
>
> (c) the financial burden of storing, handling and being billed for unwanted publications (D-6, 7, 8);
>
> (d) the violation of "elementary business moralities and decencies." (D-6).

While it is true that the State has the right to restrict the distribution of obscene literature, it is equally incontrovertible that the State has no power to restrict the dissemination of "books, magazines and other publications" which are not obscene. *Smith* v. *California*, 361 U. S. 147, 152 (1959). The Court below found that the legislature of New Jersey "was concerned with obscenity and had undoubted power to deal with the subject" but it is clear that the legislature, by failing to limit the application of this statute to obscenity, has unreasonably restricted freedom of the press. *Talley* v. *California*, 362 U. S. 60 (1960); *Smith* v. *California*, (*supra*). This position is clearly stated in *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961):

> "It follows that under the Fourteenth Amendment, a State is not free to adopt whatever procedure it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech" (at p. 730).

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* D refers to the Decision of the Supreme Court of New Jersey annexed hereto as Appendix A.

In other words, the mere fact that the legislature "was concerned with obscenity" does not justify a statute which has the effect of curtailing the distribution of literature which is in no way obscene. A Michigan Legislature concerned with the effect of certain publications on young readers, passed a statute which had the effect of curtailing the distribution of literature to both young and old readers. The Supreme Court of the United States declared that statute unconstitutional, *Butler* v. *Michigan*, 352 U. S. 380, (1956), stating that surely this "is to burn down the house to roast the pig." (at p. 383).

Nor do the suggested "evils" of fire hazard, storage problems, financial burdens and breached business moralities support the statute in question. The evolution of this statute from The Commission to Study Obscenity, conclusively demonstrates its true legislative purpose. The constitutionally required safeguards for State regulation of obscenity cannot be avoided merely by clothing a statute in the garb of a fire or health regulation. As was stated recently in *Bantam Books* v. *Sullivan*, 372 U. S. 58, 67 (1963): "We are not the first court to look through forms to the substance . . ."

Furthermore, these evils examined independent of the true statutory purpose do not sustain the validity of 1962 N. J. P. L. The appropriate test was aptly set forth in *Dennis, et al.* v. *United States*, 341 U. S. 494, (1951) as follows:

> "In each case (courts) must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech and is necessary to avoid the danger" (at P. 510, quoting Chief Judge Learned Hand, in 183 F. 2d at p. 212).

Certainly, the "evils" in this case are far from grave, are of dubious probability, and an invasion of free speech is

unnecessary because of the availability of direct remedies; further such "evils" do not independently, even in the eyes of the Legislature of New Jersey justify the resulting restriction of freedom of the press. Further, the Supreme Court of New Jersey, in sustaining the legislative purpose supporting this statute erred by presuming "factual support for legislative judgment" (D-11 and D-7). Such a presumption is contrary to the expressed view of this Court:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedom secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 89 L. Ed. 431, 65 Sup. Ct. 315 (1945).

Surely, a legislative committee to study obscenity cannot by its bare statement of fire hazards and storage problem, strip away the protections of free speech. As the United States Supreme Court stated so recently, ". . . we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of State law. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 429. Like . . . the various other formulae for the repression of expression that have been challenged by this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *The New York Times Company* v. *Sullivan, et al.*, U. S., 32 US Law Week 4184, 4189 (1964). The State of New Jersey cannot be permitted to circumvent constitutional protections by the

transparent device of labeling obscenity legislation as ordinary safety or business legislation.

C. 1962 N. J. P. L. 174 Violates the Constitutional Guarantee of Equal Protection of the Laws.

The original version of this statute as vetoed was made applicable to newspapers as well as "any book, magazine or other publication" (P. 61, 62a). As ultimately enacted, however, the reference to "newspapers" has been stricken (p. 82, 83a).

"Statutory distinctions must be based on differences that are reasonably related to the purposes of the act in which it is found." *Morey* v. *Doud*, 354 U. S. 457, 465 (1957). The legislative committee to study obscene literature found no distinction between newspapers and other publications. In addition, it is obvious that newspapers are as much, if not more, of a fire and storage hazard than other types of literature. It would seem therefore that the Legislature of New Jersey in exempting newspapers from the scope of 1962 N. J. P. L. 174 has made an arbitrary and capricious distinction in violation of the constitutional guarantee of equal protection of the laws.

Such discrimination is especially pernicious where it involves specific safeguards of the Bill of Rights.

A situation strikingly similar to the case at bar was presented in *Police Commissioners of Baltimore City, et al.* v. *Siegel Enterprises*, 223 Md. 110, 162 A. 2d 727, cert. den. 364 U. S. 909, 5 L. Ed. 2d 225 (1960). In that case the Maryland Court of Appeals held unconstitutional a state statute which made it unlawful to distribute to a minor any publication which was obscene or devoted to lust or violence. The court based its decision, *inter alia*, on the ground that the exemption of newspapers constituted an unreasonable and arbitrary classification.

D. 1962 N. J. P. L. 179 Constitutes a Prior Restraint on the Distribution of Literature by Placing Pre-Censorship Power in the Hands of Private Groups and Individuals.

It is undeniable that compliance with 1962 N. J. P. L. 179 will involve substantial expense in time, effort and money on the part of Appellant. Faced with criminal penalties, a distributor has the choice of bearing such prohibitive expenses, or discontinuing the distribution of publications which retail dealers deem "objectionable." This would avoid the statutory obligation of a two day pick-up, and the prohibitive expense of guaranteeing error-free delivery. Appellant contends that such discontinuance is the clear object of the statutory scheme embodied in 1962 N. J. P. L. 174.

The omission of any reference to obscenity in this statute is a deliberate act of the legislature to avoid the constitutional safeguards which must be observed in any finding of obscenity. Instead of attacking obscenity directly and instead of attacking the distribution from the publisher to the distributor, which is the obvious source of any obscenity, the legislature has chosen to focus its attention on the retailer, the most vulnerable link in the chain of distribution. The retailer is empowered by this statute to act as a censor backed by the criminal sanction of the state. This form of censorship constitutes a prior restraint of the type consistently prohibited by the Supreme Court. *Near* v. *Minnesota*, 283 U. S. 697 (1930). This restraint is compounded by the actions of private groups that can put pressure on individual dealers, and thereby effectively curtail distribution not only to those who find certain publications objectionable, but to the public at large as well. The doctrine prohibiting prior restraints cannot be avoided merely by placing the power to restrain in the hands of retailers rather than State officials, since it is the State that has dele-

gated and will enforce the statute. See 33 N. Y. U. L. Rev. 989, *Note: Extra-Legal Censorship of Literature* (1958) which states as follows:

> "Similarly, it may be argued that although a book dealer's voluntary censorship is legally unobjectionable, the *compelling* of such censorship subverts the overwhelming public interest in free access to all books not judicially determined to be obscene and is contrary to public policy" (at p. 1006).

The Court below held that this case did not present a situation of private group precensorship. This holding ignores the threats made and the action taken by the National Organization for Decent Literature (pp. 66a, 67a, 73a).

The practices of the N. O. D. L. are well known, and include, . . . "its use of general boycotts against retail dealers who refused to withdraw from sale the books and magazines listed as objectionable by the N. O. D. L., and its tacit consent to the use of its lists by policemen and prosecutors who threatened dealers with criminal prosecution if they failed to withdraw the proscribed items from sale. (citations)" Lockhart and McClure *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960). The action of such pressure groups was encouraged by the Legislature, as expressed in the Final Report of the Commission to Study Obscenity, as follows:

> "Of somewhat broader scope is the role of the civic, religious or neighborhood organization. Because it represents greater resources in manpower and time, the organization can render valuable service in terms of general publicity regarding the nature and extent of the traffic in obscenity and a continuing study, evaluation, and publication of its

findings relating to specific obscene material. In addition, organized groups can do a real service to the community by indicating their feelings to newsdealers who stock *objectionable* materials and *by making an effort to persuade such dealers to discontinue the sale of obscenity*" (p. 60a—emphasis added).

The extreme vulnerability of the retailer to various local pressure groups is well known. See for example, 71 Harvard Law Review 326, *Note*: *Entertainment, Public Pressure and the Law* (344-347) (1957); 33 New York University Law Review 989, *Note: Extra Legal Censorship of Literature* (1953); Lockhart and McClure, *Censorship of Obscenity*, 45 Minnesota Law Review, 5, 6-9, 46, 1964 and nn. 7-22 (1960) and *Note*, *Regulation of Comic Books*, 68 Harvard Law Review, 489, 494-499 (1955).

The effect of this statute is the application of criminal sanctions without a judicial finding of obscenity. It is clear that the state has no power to restrict the dissemination of books which are not obscene, *Smith* v. *California*, *supra*. Surely it cannot grant such power to private groups. Nor can a work be banned by the State or its agents without a prior judicial finding of obscenity. *Manuel Enterprises Inc.* v. *Day*, 370 U. S. 478, (1962); *Alberts* v. *California*, 354 U. S. 476 (1957); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957). Therefore it follows that a State cannot grant to *individuals* the right to curtail the distribution of literature, based on such individuals finding that such literature is *objectionable*.

The practical effect of 1962 N. J. P. L. is to place the distributor at the mercy of self-appointed censors, who have the power to subject the distributor to criminal prosecution in the police courts of the 750 communities serviced by appellant in New Jersey.

> " . . . (H)is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." *Smith* v. *California*, *supra* (at pp. 153-154).

As the Supreme Court stated so recently,

> "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *The New York Times Company* v. *Sullivan*, *supra*.

E. 1962 N. J. P. L. 174 imposes An Arbitrary and Oppressive Restriction on a Lawful Business and Deprives Appellant of Liberty and Property without Due Process of Law.

A valid exercise of the State's police power requires (1) that there be a substantial relation between the particular regulation and the protection of the public health, safety morale and welfare and (2) that the means employed toward these ends be reasonable and not arbitrary. See *Williamson* v. *Oklahoma*, 348 U. S. 483 (1955).

1962 N. J. P. L. allegedly protects the public against obscenity, fire hazards, storage problems and the violation of ordinary business morality (see p. 11, *supra*).

As legislation against obscenity, this statute is an invalid exercise of the State's police power, because it regulates *all* literature instead of regulating only *obscene* literature. (The obvious violation of the protection of freedom of speech has already been discussed, *supra*.)

Appellant contends that the Legislature, aware of the constitutional weakness of 1962 N. J. P. L. 174 as legislation against obscenity, sought to buttress that statute with a grab-bag of statutory purposes, i.e. fire hazard, storage problems, etc. Normally, factual support for legislation will be presumed, but in this case the presumption is overcome by legislative history. The Commission to Study Obscenity was obviously not formed to study fire hazards or storage problems. No investigation was made of these problems; no hearings were held; no testimony was taken and no records or statistics have been compiled or produced. The existence of any fire hazard or any other peril remains utter speculation. Due process of law requires more than the mere statement of the legislature in support of its own legislation.

It therefore must be concluded that 1962 N. J. P. L. is arbitrary and capricious, and deprives Appellant of its liberty and property without due process of law.

Conclusion.

For the reasons hereinabove set forth, we urge this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix A.

Opinion of the Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY,

No. A-15, September Term, 1963.

HUDSON COUNTY NEWS COMPANY, INC., a domestic corporation,
Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of ESSEX COUNTY, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,
Defendants-Respondents.

Argued October 22, 1963. Decided 12/2/63.

MR. JULIUS KASS of the New York Bar argued the cause for the appellant (MR. JACOB H. BERNSTEIN, Attorney).

MR. ARTHUR W. BRINKMANN, Deputy Attorney General, argued the cause for the respondents (MR. ARTHUR J. SILLS, Attorney General of New Jersey, Attorney Pro Se and for the respondent State of New Jersey; MR. BRENDAN T. BYRNE, Prosecutor of Essex County, Attorney Pro Se, MR. PETER MURRAY, Assistant Prosecutor of Essex County, Of Counsel; MR. JAMES A. TUMULTY, JR., Prosecutor of Hudson County,

Appendix A.

Attorney Pro Se, Mr. Harold Revoldt, Assistant Prosecutor of Hudson County, Of Counsel).

The opinion of the Court was delivered by Jacobs, J.

The Law Division entered a judgment declaring Chapter 174 of the Laws of 1962 (N. J. S. 2A:170-77.2a to 77.2b) to be constitutional. The plaintiff appealed to the Appellate Division and we certified before argument there.

In 1960 a joint legislative commission was created to study and investigate obscenity in certain publications and to report its findings together with legislative proposals. In due course the commission submitted its final report. See *N. J. Legislature, Joint Commission to Study Obscenity in Certain Publications, Final Report* (1962). It made a conclusional finding that the "sale of obscene and pornographic materials constitutes a serious threat to the ethical and moral well-being of the youth of the State and thus creates a clear and present danger to all its citizens." It also made several legislative recommendations. Firstly, it recommended that the definition of obscenity expressed in *Roth* v. *United States*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957) be incorporated in Chapter 115 of Title 2A of the New Jersey Statutes. This was done by the enactment of Chapters 165 and 166 of the Laws of 1962 (N. J. S. 2A:115-1.1; N. J. S. 2A:115-3.4). Secondly, it recommended that there be statutory authority for the use of a limited injunction against the sale of obscene materials. This was provided for in Chapter 166 of the Laws of 1962 (N. J. S. 2A:115-3.5). Thirdly, it recommended that, in order to strengthen existing legislation dealing with tie-in sales (N. J. S. 2A:115-3.1; *cf.* N. J. S. 2A:170-77.2), "the shipment by a distributor of any publication not previously ordered by name in writing by the newsdealer should be declared a disorderly act." Assembly Bill No. 492 was introduced to implement this recommendation. The introducer's statement set forth the purpose of the bill as being to relieve retailers who sell newspapers, magazines, periodi-

cals, pocket books and the like, of the burden of handling and storing "unwanted materials." It also noted that the bill was intended to place the responsibility for handling "objectionable material" upon the retailer since he will have to order it and, "at the same time, to prevent distributors from disseminating the increasing supply of obscene publications for which they claim no responsibility."

The bill passed both the Assembly and the Senate but was conditionally vetoed by the Governor. In his veto message, the Governor expressed the view that while efforts designed to eliminate obscenity should be supported, care must be taken to insure that those efforts do not infringe on the constitutional right of free expression. He considered that the bill as passed was unduly broad and would seriously hamper the distribution of all publications whether obscene or not, and he voiced the thought that the evils aimed at by the Legislature could be dealt with effectively without impairment of any of the constitutional freedoms. He suggested that the bill be altered to permit a distributor to deliver publications to a retailer as theretofore, except where the retailer has given written direction that a particular publication shall not be sent; in such event, the distributor would be obliged to honor the direction and if he failed to do so the retailer would be enabled to notify him to remove, promptly and without charge, the unordered and unwanted publication under penalty of law. The Governor's suggestion was adopted by the Legislature and the altered bill, as passed and approved by the Governor, became Chapter 174 of the Laws of 1962. It reads as follows:

> "1. No person, firm or corporation engaged in the business of distribution of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer not to send or deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication.

> 2. Any person, firm or corporation which fails to comply with the provisions of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500.00 or imprisonment for 30 days or both."

After the passage of the law, the plaintiff received a letter from the Hudson County Prosecutor's office inviting it to attend a conference where the new laws relating to "obscene publications and the sale and distribution of all magazines and publications" would be considered. At that conference the representative of the prosecutor stated that his office would immediately prosecute any violations of Chapter 174. Similarly the Chief of Police of East Orange, Essex County, addressed a letter to newsdealers, citing Chapter 174 and requesting that violation by any distributor be called to his attention so that action might be taken forthwith. Thereafter the plaintiff filed a petition in the Law Division of the Superior Court, naming the Attorney General and the Prosecutors of Hudson and Essex Counties as defendants, and seeking a declaration that Chapter 174 is unconstitutional. The petition alleged that the plaintiff is a wholesale distributor of newspapers, magazines, paperback books and other publications and does business in the State of New Jersey including Hudson and Essex Counties; it distributes publications to over 1500 retail dealers and its sales amount to $6,000,000 annually; its policy has always been to refrain from delivering any title or titles "if so requested by any dealer"; its practice is "to make a pickup once every week of all returns from retail dealers"; and, if it were required to arrange for the pickup of

particular unwanted publications as provided by Chapter 174, it would be subjected to additional expenditures and its present method of distribution would be rendered "economically unfeasible."

The petition sought a preliminary injunction; and an order to show cause why such relief should not be granted was issued. Answers were filed by the defendants and the order to show cause came on for hearing before Judge Fusco. At that time counsel agreed that there were no material factual disputes and that the matter could be disposed of as though on final hearing. No question was presented as to the suitability of the proceeding which was under the Declaratory Judgment Act. N. J. S. 2A:16-50 *et seq.*; *Lucky Calendar Co.* v. *Cohen*, 19 N. J. 399, 408-409 (1955). After hearing argument, the court determined that the statute is constitutional and a judgment to that effect was entered. In support of its appeal the plaintiff advances the same three points which were rejected below. It contends that Chapter 174 (1) imposes "an arbitrary and oppressive restriction on a lawful business" and thereby denies due process, (2) impairs "the constitutional protection of freedom of the press," and (3) violates "the constitutional guarantee of equal protection of the laws."

In dealing with statutory enactments we seek their purpose and effect and in our search we freely avail ourselves of legislative history. See *N. J. Pharmaceutical Ass'n* v. *Furman*, 33 N. J. 121, 130 (1960); *Lloyd* v. *Vermeulen*, 22 N. J. 200, 206 (1956). Here the history clearly discloses the evils aimed at and the efforts to deal with them within constitutional limits. There is no doubt that the original bill was viewed by its sponsors as an additional weapon in the arsenal against obscenity. But there is equally no doubt that the bill, as finally enacted, is not confined to and does not turn on any finding of obscenity. It provides that when a distributor sends a particular publication of whatever nature to a retailer, despite earlier written direction to the contrary, the retailer may notify the dis-

tributor that he wants it picked up and, in such event, the distributor must do so promptly. Absent any statute, elementary business moralities and decencies would require ready compliance by the distributor; the question before us is whether, in the circumstances at hand, the placing of the authority of the State behind those moralities and decencies violates any constitutional inhibitions.

In its first point, the plaintiff contends that even when viewed strictly as a business regulation, Chapter 174 violates the due process clause. It acknowledges that the State has general police power to impose business regulations but it stresses that a valid exercise of that power requires (1) that there be a substantial relation between the regulation and the protection of the public health, safety, morals or general welfare, and (2) that the means employed be reasonable and not arbitrary, citing *Reingold* v. *Harper*, 6 N. J. 182, 191-192 (1951); *N. J. Good Humor, Inc.* v. *Bradley Beach*, 124 N. J. L. 162, 168 (E. & A. 1940); *Regal Oil Co.* v. *State*, 123 N. J. L. 456, 460-461 (Sup. Ct. 1939). The respondents do not dispute these requirements but urge that they are fully satisfied here. They note that when unwanted publications are delivered to the retailer he is not only burdened with problems of handling and storage and fire hazards, but is also placed under financial burden since he is charged upon receipt of the publications and is not credited until their return. They might also have noted that continued receipt and possession by the retailer of the unwanted publications might place him in jeopardy of arrest by police authorities where the publications are deemed to have crossed the border into obscenity.

The State's police power is admittedly comprehensive; within wide outer limits it may be invoked by the Legislature whenever it deems it necessary for the protection of the public health, safety, morals or general welfare. *Reingold* v. *Harper*, *supra*, 6 N. J. at 194; *Fried* v. *Kervick*, 34 N. J. 68, 74 (1961). In our State, as elsewhere, the gen-

eral welfare concept has received broad definition. *Pierro* v. *Baxendale*, 20 N. J. 17, 28 (1955). When subjected to judicial review, business restrictions imposed by statute under the police power are surrounded by strong presumptions of constitutional validity. *Fried* v. *Kervick*, *supra*, 34 N. J. at 74; *Gibraltar Factors Corp.* v. *Slapo*, 23 N. J. 459, 463 (1957). With the aid of these presumptions, this Court has over the years rejected many due process attacks on business regulations which were infinitely more far reaching than those in Chapter 174. See *Reingold* v. *Harper*, *supra*, 6 N. J. 182; *Family Finance Corp.* v. *Gaffney*, 11 N. J. 565 (1953); *Abbotts Dairies* v. *Armstrong*, 14 N. J. 319 (1954); *Lionel Corp.* v. *Grayson-Robinson Stores*, 15 N. J. 191 (1954); *National City Bank of New York* v. *Del Sordo*, 16 N. J. 530 (1954); *Fried* v. *Kervick*, *supra*, 34 N. J. 68; *Gibraltar Factors Corp.* v. *Slapo*, *supra*, 23 N. J. 459; *American Budget Corp.* v. *Furman*, 67 N. J. Super. 134 (Ch. Div. 1961), *aff'd*, 36 N. J. 129 (1961); *Jones* v. *Haridor Realty Corp.*, 37 N. J. 384 (1962).

In *Reingold* v. *Harper*, *supra*, the Court dealt with a statute which forbade retail gasoline dealers from operating their stations on a self-service basis. The legislation had been sponsored by competitors of self-service operators who advanced safety as well as economic considerations. In sustaining the legislation, this Court through Justice Heher noted that prohibition of the self-service device as a means of distributing gasoline was permissible if the Legislature could "reasonably conceive that method to be dangerous to the public health and safety" 6 N. J. at 195-196. In invoking the various presumptions in favor of constitutional validity, he noted that factual support for the legislative judgment was to be presumed and that, in the absence of a showing to the contrary, the court would assume that the measure rested "upon some rational basis within the knowledge and experience of the Legislature." 6 N. J. at 196. *Cf. Harvey* v. *Essex County Board of Freeholders*, 30 N. J. 381, 390 (1959); *United States* v. *Carolene*, 304 U. S. 144, 152, 82 L. Ed. 1234, 1241 (1938).

Appendix A.

In *Fried* v. *Kervick*, *supra*, an attack was made on a statutory provision which prohibited the granting of any rebate or other allowance "so as to permit any person to obtain motor fuel from the retail dealer below the posted price." The attack was rejected in an opinion by Justice Francis which noted that the police power is incapable of precise definition and limitation and that its boundaries expand to permit regulation of "an evil associated with any business which for the public good justifies the particular measure of control." 34 N. J. at 75. Reference was also made to the oft-repeated judicial expressions that the Legislature may be presumed to know the needs of its people and may draw distinctions based upon degrees of evil. *Ibid. Townsend* v. *Yeomans*, 301 U. S. 441, 451, 81 L. Ed. 1211, 1219 (1937); *Two Guys From Harrison, Inc.* v. *Furman*, 32 N. J. 199, 229 (1960).

The approach in *Reingold* v. *Harper* and *Fried* v. *Kervick*, was recently applied to sustain a New Jersey statute which prohibited persons from engaging in the debt adjusting business. See *American Budget Corp.* v. *Furman*, *supra*, 67 N. J. Super. 134, 36 N. J. 129. The court's opinion stressed that presumably the Legislature was aware of the dangers of fraud and abuse in the field and concluded that prohibition rather than regulation was the proper remedy. Whether the best remedy had been chosen was held not to be a matter for the court's concern so long as it was reasonably related to the evils at hand. Although the New Jersey case did not reach the United States Supreme Court, that Court did pass on a similar Kansas statute. See *Ferguson* v. *Skrupa*, U. S. , 10 L. Ed. 2d 93 (1963). It held that the Kansas Legislature was free to decide for itself that a statute was needed to deal with the business of debt adjustment and that the Kansas enactment did not violate the due process clause. In his opinion, Justice Black pointed out that the Supreme Court would not sit as a superlegislature to weigh the wisdom of the legislation and that it would refuse to go back to

earlier days when business regulations were stricken because they were deemed "unwise, improvident or out of harmony with a particular school of thought." U. S. at , 10 L. Ed. 2d at 98. See *Williamson* v. *Lee Optical of Okla.*, 348 U. S. 483, 488, 99 L. Ed. 563, 572 (1955).

We likewise shall not sit as a superlegislature or concern ourselves with the wisdom or policy underlying the statute. Our only function is to determine whether the Legislature, by its passage of Chapter 174, exceeded the broad limits of its constitutional power. It was concerned with obscenity and had undoubted power to deal with the subject. See *State* v. *Hudson County News Co.*, 35 N. J. 284 (1961); *cf. Roth* v. *United States*, *supra*, 354 U. S. 476, 1 L. Ed. 2d 1498. In its study it determined that prevailing distribution practices unduly diluted responsibility between the distributor and the retailer and imposed an unfair burden and jeopardy upon the retailer. The Legislature sought to curb these evils* in the public interest and the means it chose were in no sense unreasonable or arbitrary; indeed they were minimal in their restrictive nature.

Paragraph 1 of Chapter 174 simply provides, without penalty, that the distributor shall not send any particular publication to the retailer where he has received written direction from the retailer to the contrary. That such should be the policy of distribution may hardly be gainsaid; the plaintiff's own complaint states that its policy has always been to refrain from delivering any particular publication, if so requested by the retailer. Paragraph 2 provides that if the distributor has sent a publication to the retailer despite written directions to the contrary, the

* In enacting legislation for the public benefit the Legislature may, of course, seek to protect a segment of industry from the abusive practices of a more powerful segment. See *Antonio Roig Sucrs. S. En. C.* v. *Sugar Board of Puerto Rico*, 235 F. 2d 347, 351 (1st Cir.) *cert. denied*, 352 U. S. 928, 1 L. Ed. 2d 162 (1956); *Kuhl Motor Co.* v. *Ford Motor Co.*, 270 Wisc. 488, 71 N. Y. 2d 420 (1955); *cf. Gibraltar Factors Corp.* v. *Slapo supra*, 23 N. J. 459; *Borden Co.* v. *McDowell*, 8 Wisc. 2d 246, 99.

retailer may notify him of that fact, in which event the distributor shall forthwith pick up the publication without charge. Here, again, it may not be disputed that such should be the policy and the plaintiff's own complaint asserts that its practice is to pick up returns although not as promptly as called for by the statute.

The requirement of promptness is a fair one and the fact that its imposition may compel the plaintiff to alter its private business practices cannot serve to impair the constitutional validity of the statute. The plaintiff contends that the requirement of removal within two days is oppressive in that it would apply even where it "inadvertently or by some act completely beyond its control" fails to effect its pickup. At oral argument the State disavowed any legislative intent to punish for inadvertence and agreed that the statute should be construed to apply only to willful failures to remove within the allotted time. This construction, which we now adopt, is consistent with recent pronouncements which have justly sought to avoid the imposition of punishment for innocent default. See *State* v. *Hudson County News Co., supra*, 35 N. J. at 293; *cf. State* v. *Schlueter*, 127 N. J. L. 496, 499 (Sup. Ct. 1941).

In the light of the presumptions of validity and the cited authorities, we have no hesitancy in rejecting the plaintiff's first point that Chapter 174 imposes an arbitrary restriction on a lawful business and thereby deprives the plaintiff of due process. We come now to its second point under which it asserts that the statute violates the constitutional protection of freedom of the press, citing cases such as *Talley* v. *California*, 362 U. S. 60, 4 L. Ed. 2d 559 (1960); *Marcus* v. *Property Search Warrant*, 367 U. S. 717, 6 L. Ed. 2d 1127 (1961); and *Bantam Books* v. *Sullivan*, 372 U. S. 58, 9 L. Ed. 2d 584 (1963). These decisions evidence the great breadth of protection which is properly afforded to the distribution of publications; however, they contain nothing which indicates any constitutional infirmity in Chapter 174.

In *Talley* a divided Court struck down a municipal ordinance making it a criminal offense to distribute hand-

bills which did not contain the names and addresses of the persons who prepared or sponsored them; the majority's solicitude for anonymity in the distribution of handbills has no relation to any problem presented by Chapter 174. It may be noted that no reference was made in the Court's opinion to *Breard* v. *Alexandria*, 341 U. S. 622, 95 L. Ed. 1233 (1951),** which rejected an attack on an ordinance prohibiting uninvited house-to-house solicitation of magazine subscriptions, thus upholding a far greater restraint upon the free flow of publications than anything envisioned in the plaintiff's argument here. See *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 50-52, 6 L. Ed. 2d 105, 116-117 (1961). In *Marcus* the Court struck down a search and seizure at the premises of a wholesale distributor of publications made pursuant to a Missouri statute and court rule authorizing general searches of places where obscene material was believed to be located; the Court determined that the mass seizure, which resulted in a previous restraint of widespread nature, was effected without adequate safeguards to protect legitimate expression and was violative of the Fourteenth Amendment. Nothing at all comparable to the mass seizure in *Marcus* is before us.

The opinion in *Bantam Books* dealt with the activities of a commission established pursuant to a Rhode Island statute which vested it with the duties of educating the public with respect to books and other materials containing obscene language and of recommending prosecution of violations of pertinent statutory provisions. The commission's practice was to notify a distributor that a certain

** *Breard* has been the subject of persistent questioning by individual members of the Supreme Court. See *Perez* v. *Brownell*, 356 U. S. 44, 82-83, 2 L. Ed. 2d 603, 627 (1958); *Poulos* v. *New Hampshire*, 345 U. S. 395, 425, 97 L. Ed. 1105, 1124 (1953); *Beauharnais* v. *Illinois*, 343 U. S. 250, 285, 96 L. Ed. 919, 943 (1952). Its citation here is not intended to intimate agreement with the Supreme Court's holding on the facts before it nor is it intended to intimate that the New Jersey court would reach a similar result under Art. 6, para. 1 of the State constitution.

book or other publication had been determined by a majority of its members to be objectionable for distribution to persons under 18 years of age. Its notice was phrased virtually as an order and was reasonably so understood by the distributor. The Court found that the practice of the commission amounted to informal censorship and infringed upon the distributor's constitutional right of freedom of expression. Although it held that there should be a restraint against the practice, it did not declare the statute to be unconstitutional. See 372 U. S. at 75, 9 L. Ed. 2d at 596.

The great freedoms of expression are invaluable rights guaranteed by both our State and Federal Constitutions and they must be vigilantly guarded. They clearly include the right of distribution for without it the freedoms would lose much of their value. See *Lovell* v. *Griffin*, 303 U. S. 444, 452, 82 L. Ed. 949, 954 (1938). Precensorship must be rigorously curbed (*Bantam Books, Inc.* v. *Melko*, 25 N. J. Super. 292 (Ch. Div. 1953), modified, 14 N. J. 524 (1954); *cf. Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 1 L. Ed. 2d 1469 (1957); *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 5 L. Ed. 2d 403 (1961)), though certain forms of speech may be declared criminal (*Roth* v. *United States*, *supra*, 354 U. S. 476, 1 L. Ed. 2d 1498) and certain general regulatory requirements may be imposed despite incidental effects on the freedoms. See *Konigsberg* v. *State Bar of California*, *supra*, 366 U. S. at 50-52, 6 L. Ed. 2d at 115-117; *cf. Absecon* v. *Vettese*, 13 N. J. 581, 586 (1953); *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 184, 90 L. Ed. 607, 613 (1946).

Chapter 174 contains no elements of precensorship. The distributor may, as heretofore, freely distribute his publications. He incurs no penalty for distributing a publication even after having received a written direction to the contrary. It is only when he is specifically called upon by the retailer to pick up the unwanted publication without charge that he comes under an obligation of promptness which, if willfully disregarded, may subject him to a penalty. It is difficult to see how this elemental and thoroughly decent

obligation can in itself be viewed as an unconstitutional restriction on freedom of the press. The retailer admittedly has the unfettered freedom to reject any unordered publication. He may consider it obscene, objectionable though not obscene, or just not salable. His right of rejection is absolute and the State's implementation of that right, in the carefully limited manner set forth in Chapter 174, may readily serve the stated legislative goals without infringing on any constitutional freedoms.

The plaintiff has suggested that future practices and pressures by public officials and private groups may be such that the retailer will not exercise any judgment of his own but will bow to their advance specifications, thus presenting a form of precensorship comparable to *Bantam Books* v. *Sullivan, supra.* That is not the situation before us and we therefore need not deal with it. The Supreme Court did not strike the statute in *Bantam Books* and our only concern at this time is with the validity of the staute and not with practices and pressures which may never materialize. See *Isolantite, Inc.* v. *United Electrical, &c., of America,* 132 N. J. Eq. 613, 619 (E. & A. 1942); *State* v. *Bryce,* 56 N. J. Super. 83, 90 (App. Div. 1959).

The plaintiff's third and final point is that Chapter 174 violates the constitutional guarantee of the equal protection of the laws. It construes Chapter 174 as exempting newspapers and says that this effects an arbitrary classification. When Assembly 492 was originally passed, it contained a specific reference to newspapers which was later deleted in accordance with a recommendation in the Governor's veto message. For present purposes we may assume that Chapter 174 was intended to exempt newspapers; we are satisfied nonetheless that such an exemption in nowise impairs the constitutional validity of the enactment. See *Williamson* v. *Lee Optical of Okla., supra,* 348 U. S. at 488-489, 99 L. Ed. at 572-573; *N. J. Restaurant Assn.* v. *Holderman,* 24 N. J. 295, 300, 301 (1957). In *Williamson,* the Supreme Court upheld an Oklahoma statute

which subjected opticians to a regulatory system but exempted sellers of ready-to-wear glasses; in the course of his opinion Justice Douglas had this to say:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 US 141, 84 L ed 1124, 60 S Ct 879, 130 ALR 1321. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Oregon State Dental Examiners*, 294 US 608, 79 L ed 1086, 55 S Ct 570. The legislature may select one phase and hold and apply a remedy there, neglecting the other. *A. F. of L.* v. *American Sash & Door Co.*, 335 US 538, 93 L ed 222, 69 S Ct 258, 260 6 ALR2d 481. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch." 348 US at 489, 99 L ed at 573.

Here the evils aimed at were primarily in the field of books and magazines. The Legislature had the clear right to confine itself to that field so long as it treated similarly circumstanced distributors in similar fashion. There was no disparate treatment among the distributors. Within the well-accepted principles expressed in *Williamson*, *there* was patently no denial of equal protection. See *Two Guys From Harrison, Inc.* v. *Furman*, *supra*, 22 N. J. at 228-229 *Gundaker Central Motors* v. *Gassert*, 23 N. J. 71, 80-82 (1956); *Jamouneau* v. *Harner*, 16 N. J. 500, 519-521 (1954), *cert. denied*, 349 U. S. 904, 99 L. Ed. 1241 (1955).

Affirmed.

Appendix B.

Oral Opinion of Superior Court of New Jersey.

[Same Title.]

The Court: Gentlemen, this is an action for a declaratory judgment pursuant to N. J. S. A. 2A: 16-60, wherein the plaintiff, Hudson County News Company, Inc., a domestic corporation, seeks an adjudication of the constitutionality of the pamphlet laws, 1962, chapter 174, in order to avoid the criminal (34) prosecution with which it is threatened by the respective defendants, to wit, Arthur J. Sills as Attorney General of the State of New Jersey, Brendan T. Byrne as Prosecutor of Essex County, James A. Tumulty, Jr., as Prosecutor of Hudson County and the State of New Jersey. The material facts are not in dispute and the parties have agreed that the matter be considered an application for summary judgment without the necessity of filing further pleadings.

The plaintiff, a corporation of the State of New Jersey, is engaged in the distribution of books, magazines, newspapers and other publications to over 1500 retail dealers in New Jersey and as part of such a distribution, the plaintiffs effects the delivery of a total of more than one and a half million copies of such publications every month and has sales totaling approximately $6,000,000 per year. The statute brought into issue by the present proceedings was enacted on December 3rd, 1962, to become effective January 17th, 1963. It provides, in part, that, "no person, firm or corporation engaged in the business of distribution (35) of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer, not to send or deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication. Section 2. Any person, firm or corporation which fails to comply with the provision of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove

from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500 or imprisonment for 30 days or both."

The complaint alleges that at a meeting held on January 24th, 1963, the Hudson County Prosecutor announced that he would enforce this statute by promptly prosecuting all violations. (36) On January 16th, 1963, the Chief of Police of East Orange sent out letters in which he requested the cooperation of newsdealers in the prosecution of the violations of the statute. The Hudson County Prosecutor's office has distributed letters for the purpose of encouraging assistance in the immediate prosecution of alleged violations of the statute.

The plaintiff contends that it is its practice to refrain from delivering any title which any dealer requests not be delivered. Plaintiff points out that the delivery of undesired publications is economically detrimental to it and, therefore, the plaintiff makes every reasonable effort to avoid and prevent distribution of materials not desired by dealers. To this extent it would appear that the statute is a codification of plaintiff's practice. In spite of the practice of the plaintiff a certain number of unwanted publications are delivered either inadvertently or through a failure to receive timely notice in accordance with delivery schedules. These publications are periodically collected from the (37) retail dealers and are then returned to the respective publishers. It is its practice to make pickups of unwanted publications once a week. The statute requires pickups in two days of notification.

The plaintiff then asserts that the employment of further preventive methods to preclude all unwanted deliveries, as required by the statute, would require an addi-

tional expenditure of funds as would render the distribution system of publications completely uneconomical and would result in a substantial curtailment of the distribution of publications presently made available.

Annexed to the complaint is the affidavit of L. Swanwick, the magazine manager of the plaintiff corporation, who is responsible for effectuating the policies of the plaintiff in regard to magazine distribution.

He states that the statutory requirement that undesired material be picked up within two days after notice is entirely unworkable, in that the cost of making such pickups would, in his opinion, be staggering and unbearable. The cost of employing additional (38) drivers and trucks necessary to make such pickups would amount to a minimum of $50,000 a year, which would make it unprofitable for the plaintiff to distribute various publications and would result in curtailing the disiribution of publications in the 83 communities which are served. Mr. Swanwick then concludes that it would be impossible for the plaintiff to avoid criminal prosecution under the present statute. The plaintiff's contentions with respect to the validity of the statute are:

1. That it infringes upon the plaintiff's freedom of the press by unreasonably restricting and curtailing plaintiff's distribution of publications to the retail dealers.

2. It is violative of the constitutions of the United States and State of New Jersey in that it deprives the plaintiff of property without due process of law, and it is violative of the equal protection provision of the constitutions of the United States and the State of New Jersey.

Its application for a declaratory judgment is predicated upon its assertion that the (39) statute subjects the plaintiff to additional business expenditures causing its business operations to be economically unfeasible and to immediate criminal prosecution.

The Declaratory Judgments Act, is a statute to settle and afford relief from uncertainty and insecurity with

respect to rights, status and other relations. It is to be liberally construed and administered to effectuate its purpose and intent. It modifies the common law rule that there is no justiciable controversy until a right has been invaded.

Carls versus *Civil Service Commission*, 31 New Jersey Super. (Appellate Division 1954), affirmed 17 New Jersey 215 (1955).

In *Lucky Calendar Company* versus *Cohen*, 19 New Jersey 399 (1955), in which the present court participated in, a county prosecutor advised plaintiff corporation engaged in promotional advertising that its proposed promotion plan had the characteristics of a lottery and that the corporation would be subject to criminal action if it conducted the sales promotion. The court held that the corporation was entitled to maintain an action for declaratory judgment (40) prior to submitting itself. Chief Justice Vanderbilt in this case said, "there is a bona fide justiciable controversy as to the legal right of the plaintiff to engage in the kind of activity discussed herein. The duty of the defendant to prosecute violations of the criminal law of this State within its county is clear. Accordingly, there are present, the necessary elements for declaratory judgment. The salutary purposes contemplated by the Declaratory Judgments Act are clearly served when such conflicting interests are determined without the necessity of compelling the plaintiff to expose itself and its customer to the risk of criminal prosecution." The plaintiff is entitled to maintain the present declaratory judgment action in order to determine the validity and constitutionality of the statute in question.

In considering the constitutionality of the statute a basic principle to be borne in mind is that there is a strong presumption in favor of constitutionality in *Re Lock Arbour*, 25 New Jersey, 248 (1957); *State* versus *Monroe*, (41) 30, New Jersey, 160 (1959). The burden of proving unconstitutionality of a statute is upon the one who asserts it.

Now, our Supreme Court has said that the statute should be interpreted by a mind sympathetic to its aims and which recognizes the difficulties inherent in formulating a precise expression of legislative intent in light of diversity of circumstances to be covered. It must also be presumed that the legislature acted with integrity and with an honest purpose to keep within the constitutional limits. If it keeps within its constitutional powers, the courts will not pass judgment upon the wisdom of its enactments. *Lane* versus *Holderman*, 23 New Jersey, 304 (1957).

With these principles in mind, consideration must now be given to the contentions of the plaintiff to determine whether the statute is a valid exercise of legislative power. One of the contentions of the plaintiff is that the statute is violative of the equal protection provisions of the constitution of the United States and the State of New Jersey. The basis for this contention is that the statute originally (42) included the word "newspapers" but this was subsequently removed from its enactment. The plaintiff states that to subject a distributor of books, magazines and other publications to such restrictions as the statute imposes while exempting the distribution of newspapers is discriminatory. The statute is to be construed as adopted. The fact the legislature may have failed in its purpose is not before me. The mere fact that the legislature may have contemplated regulating other industries or enterprises and did not, is not controlling; as is not the final report of the commission to study obscenity in certain publications pursuant to assembly concurrent resolutions 15, 1960, which report is dated April 10th, 1962. In this record the statement appended to the bill might be considered since the report has been submitted in which the statement is appended under IV. The statement reads, "The purpose of the bill is to relieve retail dealers who sell newspapers, magazines, periodicals and pocketbooks; of handling and storing of unwanted material." That is the nature of the statement that appears as to (43) assembly bill 492. The

equal protection clause simply means that all persons subject to State legislation shall be treated alike, under like circumstances, in like group or classification. *Smith* versus *Texas*, 311 U. S. 128 (1955); *Schmidt* versus *Board of Adjustment of City of Newark*, 9, New Jersey, 405 (1952). The guaranty of equal protection was aimed at discriminating impartial legislation in favor of particular persons as against others in like condition. *Truax* versus *Corrigan*, 257 U. S. 312 (1921). However, the salutary principle of equal protection does not preclude a legislature from establishing classification if there is a rational or reasonable basis for the legislative distinction. Classification by state legislature will not render a state statute unconstitutional if there is a reasonable basis for such classification. It is only those discriminations which are unreasonable and not based on some justifiable distinction which are unlawful. A judicial inquiry is aimed solely at whether the legislative determination is so lacking in any reasonable basis as to be arbitrary and (44) capricious. *Morey* versus *Doud*, 354 U. S. 457 (1957).

The purpose of the statute is to relieve retail dealers who sell magazines, periodicals and other publications of the handling and storing of unwanted material. It is further designed to preclude a hardship upon the retail dealer when material he finds unacceptable for any reason is delivered to him and he is financially responsible for it, hence should anything happen to it before it is picked up by the distributor as returned material, the retailer is forced into the position of paying for something he neither ordered nor wants. The legislature in its wisdom has decided that magaines are within the evils sought to be remedied by the present legislation. Therefore, it is this court's conclusion that the statute is not a denial of equal protection.

The second ground put forth by the plaintiff is that the statute deprived the plaintiff of property without due process of law. The general limitation imposed upon a legis-

lative exercise of the police power is that the exercise of such power must be reasonable. That is, (45) there must be relation to the health, safety, morals or general welfare of the community, *Reingold* versus *Harper*, 6 New Jersey, 183 (1951). It has generally been held that a state may impose regulations upon business by a valid exercise of its police power for the constitution of the United States does not guarantee the unrestricted privilege to engage in a business or conduct as one pleases. *Nebbia* versus *New York*, 291 U. S. 502 (1934); *Lane Distribution* versus *Tilton*, 7 New Jersey, 349 (1951). The plaintiff has no special immunity from laws applicable to business in general.

The plaintiff states that the present statute goes beyond the scope of the police power in that it denies or unreasonably curtails its common right to engage in a lawful business and infringes upon the right of private property secured by the State and Federal constitutions. This contention is specious. The express legislative purpose of the statute is to prevent delivery of unwanted materials to a retailer and not to curtail publication or distribution for those who desire it. (46) Appended to the affidavit of the plaintiff are several letters from retail distributors one of which indicates, "I do not wish to receive National Inquirer any longer"; another in which he enumerates many magazines among which are, "cancel all tax forms or books relating to tax. Hod Rods only one. Guns and Ammo do not want. Gun and Hunting do not want. Auto Sports send only one." And it goes on and on. To enumerate the nature of the action or publication, this particular distributor or retailer doesn't want the Woodworker's Encyclopedia, do not want Home Built Power Tools, Car Repair Hand Book, other electronic hand books, do not want.

The burden is cast upon the retailers to notify distributors of those magazines and publications which they do not want or desire to return. This essentially is intended to protect the retail dealer and assures under the police power

of the State, to the business men, economic convenience in the operation of his business.

With regard to the expense which is alleged will be incurred by the plaintiff in (47) making pickups of the unwanted magazines from the various retail dealers, it is not at all clear that this difficulty could not largely be obviated by proper business methods in distribution. In any event, the plaintiff has not established that there is a deprivation of property without due process of law.

The final contention of the plaintiff is that the statute infringes upon the plaintiff's freedom of the press by unreasonably curtailing plaintiff's distribution of publications to retail dealers. This causes the court a great deal of concern. It must be considered in the light of the express language of the statute under attack.

The freedom, guaranteed by the First Amendment of the United States constitution against abridgement by the federal government, is within the liberty safeguarded by the due process clause of the 14th Amendment, from invasion by State action. *Joseph Burstyn, Inc.* versus *Wilson*, 343 U. S. 495, 72 S. Ct. 77, 96 L. Ed. 1098 (1952). In its historic connotation, the press comprehends every sort of publication, and the guarantee of a free press covers (48) distribution as well as publication. *Lovell* versus *Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938). The issue is then whether there is an unlawful restraint on the distribution in question. It is difficult to determine wherein the prohibition lies. The plaintiff is not precluded from selling any or all magazines, newspapers, periodicals or other publications. It is not precluded from publishing or distributing, to those who want them any or all magazines, newspapers, periodicals or other publications. A refusal to accept certain publications by retail dealers could not be considered as restricting plaintiff's freedom of the press; therefore, it is doubtful if a statutory enactment which seeks to protect dealers in this respect can be a denial of the asserted constitutional right. There is no

prohibition against publication or distribution to any retail dealers of any publications which it desires. The statute merely provides that retail dealers need not receive nor store unwanted publications. The plaintiff argues that the statute will result in curtailing the distribution of publications (49) and that the retail dealer will become a censor whose actions are enforced by criminal sanctions. There is no curtailment of distribution; there is only prohibition against delivery if the retail dealers do not desire certain publications. They could refuse magazines of the type that were the subject of a decision in the the case of the *State* versus *Hudson County News Company*, decided February 20th, 1963, by the Appellate Division to avoid their own criminal prosecution. As therein held, obscenity is outside the protection of the 1st and 14th Amendment. Citing several Supreme Court cases in the opinion, which I have before me, gentlemen, I think it cites *Roth and Manual Enterprises* versus *Day*, 370 U. S. 478, (1962). However, there is nothing in the statute which precludes a retail dealer from permitting the distribution of any magazine to it or permitting those magazines distributed to it from remaining on its shelf or in its place of business. Nothing prohibits the retail dealer from obtaining any publication that he desires, including those enumerated in the complaint, such as Saturday Evening Post, (50) Time, Life, Reader's Digest, Look and all other nationally distributed magazines as enumerated by the plaintiff in its complaint.

For the reasons heretofore expressed, I conclude that the statute in question is a constitutional exercise of legislative power. Gentlemen, submit your order, consented to as to form by the several adversaries, and you can agree as to the form and settle on notice to the court.

Appendix C.

Final Decree of Superior Court of New Jersey Hudson County, Law Division.

[Same Title.]

This matter having been heard by the Court on the motion of Hudson County News Company, plaintiff, for an order to show cause, which became a motion for summary judgment, by stipulation of all parties, including plaintiff by Julius Kass, Esquire, Honorable Arthur J. Sills, Attorney General by Arthur W. Brinkmann, Deputy Attorney General, Honorable James A. Tumulty, Jr., Prosecutor of Hudson County, by Harold Ruvoldt, Assistant Prosecutor, and Honorable Brendan T. Byrne, Prosecutor of Essex County, by Peter Murray, Assistant Prosecutor, pursuant to R. R. 4:38 of the rules governing this Court; and the Court, having heard the arguments of the attorneys for the respective parties, and being of the opinion that the pleadings and admissions on file in this action together with the affidavits submitted in support of the motion of the plaintiff, Hudson County News Company, show palpably that there is no genuine issue as to any material fact challenged, and that the defendants, Arthur J. Sills, Attorney General of the State of New Jersey, James A. Tumulty, Jr., Prosecutor of Hudson County, and Brendan T. Byrne, Prosecutor of Essex County, have a right to such a judgment as a matter of law;

It is on this 14th day of March 1963, ordered that 1962 New Jersey Pamphlet Laws, Chapter 174, and in particular N. J. S. A. 2A:170-77.2(a) and (b) be deemed constitutional

and that final judgment be and is hereby entered in favor of the defendants and against the plaintiff.

RALPH L. FUSCO,
J. S. C.

By ARTHUR W. BRINKMANN
Deputy Attorney General

JAMES A. TUMULTY, JR.
Prosecutor of Hudson County

By HAROLD RUVOLDT
Assistant Prosecutor

BRENDAN T. BYRNE
Prosecutor of Essex County

By PETER MURRAY
Assistant Prosecutor

JACOB H. BERNSTEIN, ESQ.
Attorney for Plaintiff

The above Order is consented to as to form.

ARTHUR J. SILLS
Attorney General

Appendix D.

Decree of the Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY.

APPEAL DOCKET NO. 4250.

HUDSON COUNTY NEWS COMPANY, INC., a domestic corporation,
Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,
Defendants-Respondents.

Civil Action
On Appeal
Mandate on
Affirmance

This cause having been duly argued before this Court by Mr. Julius Kass, of the New York Bar, counsel for the appellant and Mr. Arthur W. Brinkmann, counsel for the respondents, and the Court having considered the same.

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Appendix D.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the second day of December, 1963.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED
Dec. 2, 1963,
John H. Gildea,
Clerk.

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JOHN H. GILDEA

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IN THE

Supreme Court of the United States

October Term, 1963

No. 1037

HUDSON COUNTY NEWS COMPANY, INC.,
a domestic corporation,
Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,
Defendants-Respondents.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

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Defendants-Respondents.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

Statement

(Page references are to the Appendix for Plaintiff-Appellant certified to this Court by the New Jersey Supreme Court.)

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. (hereinafter, "CPDA"), with the consent of all parties to this action, in support of plaintiff's jurisdictional statement.

Interest of the *Amicus Curiae*

CPDA is a national trade association of wholesalers of magazines, newspapers, paperback books and children's books. It is interested in the outcome of this litigation because if the opinion of the New Jersey Supreme Court upholding the constitutionality of 1962 New Jersey Pamphlet Laws, Chapter 174, is not reviewed and reversed by this Court, there is a substantial probability that other states will enact similar legislation. Indeed, we have been informed that at least one state legislature is presently considering such legislation.

A state statute, similar to the statute involved here, would have the same effect upon each wholesaler in that state as it has upon the plaintiff wholesaler herein. Each wholesaler subject to such a statute would either have to forego his rights under the First and Fourteenth Amendments and cease distributing "objectionable" but non-obscene literature or would have to assume the financial burden and the risk of criminal prosecution imposed by such a statute. Accordingly, the outcome of this case is of vital concern to every CPDA member.

The Action

Plaintiff seeks a declaration, pursuant to N.J.S.A. § 2a 16-50, *et seq.*, that 1962 New Jersey Pamphlet Laws, Chapter 174 (hereinafter, "the statute") is unconstitutional. The statute provides, in pertinent part:

> 1. No person, firm or corporation engaged in the business of distribution of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer not to send or deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication

2. Any person, firm or corporation which fails to comply with the provisions of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500.00 or imprisonment for 30 days or both.

POINT I

1962 New Jersey Pamphlet Laws, Chapter 174, constitutes an unconstitutional interference with freedom of the press.

The statute makes it a crime, punishable by imprisonment, for a wholesaler to refuse to pick up a publication within two days after being told by a retailer to do so if the retailer had previously told the wholesaler not to deliver the publication. A crime has been committed whether the publication is obscene or non-obscene, and whether the delivery to the retailer is deliberate or accidental.

The purpose and effect of this statute is to prevent the distribution of "objectionable" but non-obscene literature, and the manner of regulation is such that the statute constitutes an unconstitutional interference with freedom of the press.

A. The Purpose and Effect of the Statute is to Prevent the Distribution of "Objectionable" But Non-Obscene Publications.

Freedom of the press, guaranteed by the First and Fourteenth Amendments, includes, of course, freedom of distribution (*Lovell* v. *Griffin*, 303 U. S. 444 (1938)), and

when state action interferes with freedom of the press this Court has always looked through the form in which the action is clothed and examined the action's substance. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Smith* v. *California*, 361 U. S. 147 (1959).

The substance of the statute here is revealed by the statute's effect, and there can be no question as to the effect of the statute. If a significant number of retailers—either on their own initiative or, more likely, as in the present case,[1] under pressure from vigilante censor groups such as the National Organization for Decent Literature—tell a wholesaler not to deliver a particular publication, the wholesaler has two alternatives. One alternative is to continue distributing the publication to those retailers who want it and thereby run the risk of accidental misdelivery. If he follows this course he must either bear the permanent and substantial expense of having men and trucks available to pick up publications on two days' notice or he must be prepared to face criminal prosecution and imprisonment.

The second alternative is to stop distributing any magazine to which a substantial number of retailers object. This course of action will always be safer and, in the case of many publications, it may be cheaper as well.

The result of this statute, therefore, is that many publications which are objected to by censor groups and retailers will not be distributed by retailers at all, will not reach any newsstands, and will, in all probability, be denied to the people of New Jersey. Because of the breadth of the statute such publications may cover the entire spectrum of literature from the crassest hard-core pornography through the most innocent of children's books. For, under the statute, the New Jersey public can be effectively denied non-obscene "girlie" magazines, *Reader's Digest*, *National Review*, *New Republic*, *Commonweal* and *Jack and Jill*.

---

[1] See affidavit of L. Vaughn Swanwick (72a-75a).

That this will be the effect in the case at bar is made perfectly plain by the uncontradicted affidavit of plaintiff's Circulation Manager, L. Vaughn Swanwick. Mr. Swanwick testifies:

> "The statutory requirement that undesired material be picked up within two days after notice is entirely unworkable. The cost of making such pickups would be, according to my personal knowledge of the economics of distribution, staggering and unbearable. The cost of employing the additional drivers and trucks necessary to make such pickups would amount to a minimum of $50,000.00 a year. This additional cost would make it unprofitable for Hudson County News Company to distribute magazines and other publications. The publishers fixed newsstand price prevents passing this cost on to the public. If this added cost is to be borne by either the retailer or Hudson County News Company, *the unavoidable result will be to substantially curtail the distribution of publications in the 83 communities that we service.*" (Emphasis added) (74a-75a.)

This obvious effect was also noted and referred to by the New Jersey Superior Court Justice who initially heard this case. That Court said:

> "Wouldn't it be cheaper for you not to send them out in the first instance, don't have them published? If nobody wants the Saturday Evening Post, Readers' Digest, Time or Life, don't print them. Look how much money you will have saved in the first instance, instead of printing all these books, Saturday Evening Post—there is your affidavit, Life, Readers' Digest. If you don't ship them out, you don't have to pick them up and you fellows will save more than this $50,000 extra that Mr. Swanwick said." (13a-14a.)

The restrictive purpose of the statute is made clear not only by a consideration of the statute's effect but by an examination of its legislative history as well. The statute under consideration here is a direct outgrowth of

a Report of a Joint Commission created by the New Jersey Legislature, which Report was concerned with the distribution of "border-line" pornography and not merely with obscene literature as defined in *Roth* v. *United States*, 354 U. S. 476 (1957). The present statute was enacted to replace the even more restrictive statute recommended in this Report after the statute contained in the Report had been vetoed by the Governor on the ground that it was probably unconstitutional. The vetoed statute was accompanied by a statement which provided, in pertinent part:

> "This bill is intended to place responsibility for handling *objectionable* material upon the retailer since he will have to order it, and, at the same time, to prevent distributors from disseminating the increasing supply of obscene publications for which they claim no responsibility." (Emphasis added.) (62a.)

Not only does the statute have the clear purpose and effect of preventing the distribution of constitutionally protected publications, but no alternative or additional purposes exist. All of the evils which could possibly justify the existence of this statute are already covered by New Jersey Statutes which do not impair freedom of expression. Tie-in sales involving obscene material are prohibited by N.J.S.A. § 2A:115-3.1 (Supp. 1963); the dissemination of obscene material is made a misdemeanor by N.J.S.A. § 2A:115-2 (Supp. 1963), and distribution may be enjoined pursuant to N.J.S.A. § 2A:115-3.5 (Supp. 1963). There are numerous provisions dealing with prevention of and protection from fire in the New Jersey Statutes, and N.J.S.A. § 40:48-2 authorizes municipalities to pass any ordinances necessary for the public health, safety and morals.

Moreover, it cannot be claimed that the statute is designed to prevent wholesalers from deliberately delivering to retailers publications which the retailers do not wish. If this were the legislative purpose, the criminal act would

be the deliberate delivery of the undesired publications and not, as here, the failure to promptly pick up publications which might have been accidentally misdelivered.

It is clear, therefore, that to view this statute as anything other than what it is—a state enforced means by which pressure groups can effectively prevent the distribution of literature to which they object, whether obscene or not—is to sacrifice substance to form and jeopardize the First Amendment.

B. The Statutory Interference With Free Speech is Not Reasonably Restricted to Any Evil With Which the Statute Might Deal.

When, as here, a statute impairs rights guaranteed by the First Amendment, it is not enough that the legislation have a rational basis. The legislation can only be upheld if it is needed to protect the public interest from a clear and present danger. *Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Thomas* v. *Collins*, 323 U. S. 516 (1945).

Statutes restricting freedom of expression are only justifiable when there is imminent danger that society will suffer a serious substantive evil unless freedom of expression is restricted. *Bridges* v. *California*, 314 U. S. 252, 263 (1941). The extent of the statute's interference with free speech must be weighed against the legitimate interests of the state. In this case, the interference with free speech is great, while the legitimate interest of the state which can only be protected by such interference is nonexistent.

Even if the statute did serve some legitimate state interest (and it does not), any such interest could be protected as well by measures which did not unnecessarily impair the distribution of constitutionally protected literature. This is not to suggest that this Court must tell a State legislature the means to use in carrying out its legislative duties. But when First Amendment freedoms are involved this Court must guarantee that the State legisla-

tion is "reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). Thus, no matter what legitimate purpose the State might suggest, the present statute, by unnecessarily preventing the distribution of non-obscene literature, is unconstitutional in that it burns down "the house to roast the pig." *Ibid.*; *Schneider* v. *State*, 308 U. S. 147 (1939).

POINT II

A State may not make the type of non-activity covered by this statute a crime.

The State courts have long recognized that not every act can be made a crime. *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628 (1896) (ordinance prohibiting association with reputed thieves, prostitutes, etc.); *City of Watertown* v. *Christnacht*, 39 S. D. 290, 164 N. W. 62 (1917) (ordinance prohibiting association with reputed prostitutes); *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429 (1905) (statute prohibiting issuance of trading stamps).

This Court has more recently acknowledged the fact that the police power does not grant States unlimited license to create crimes. *Lambert* v. *California*, 355 U. S. 225 (1957) (ordinance requiring convicted felons to register with chief of police held unconstitutional); *Robinson* v. *California*, 370 U. S. 660 (1962) (statute making narcotics addiction a crime held unconstitutional); see *Weems* v. *United States*, 217 U. S. 349 (1910).

This principle, that the State may not make any act which it chooses a crime, has special application in the area of First Amendment freedoms, for as this Court said in *Thomas* v. *Collins*, 323 U. S., at 540:

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we cannot think this can be accomplished by a device of re-

quiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and from imposing a penalty for violating such a restraining order."

So, here, if it cannot be a crime to distribute non-obscene literature, neither can it be a crime to fail to collect such literature, once accidentally distributed. For, by making it a crime to fail to pick up non-obscene literature the State has, in fact, effectively prohibited its distribution in the first place.

CONCLUSION

For all the above reasons 1962 New Jersey Pamphlet Law, § 174, is unconstitutional and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
MAY 25 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1037

HUDSON COUNTY NEWS COMPANY, INC.,
a domestic corporation,
Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,
Defendants-Respondents.

Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1037

HUDSON COUNTY NEWS COMPANY, INC.,
a domestic corporation,

Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,

Defendants-Respondents.

Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

Pursuant to Rule 16(b) of this Court, the Attorney General of the State of New Jersey, as Attorney *Pro Se* and on behalf of the State of New Jersey, Brendan T. Byrne, County Prosecutor of Essex County, and James A. Tumulty, Jr., County Prosecutor of Hudson County, moves to

dismiss and/or affirm on the grounds that the question presented is so unsubstantial as not to warrant further argument.

Opinions Below

The opinion from which appellant appeals to this Court is that of the Supreme Court of New Jersey entered December 2, 1963, reported in 41 N. J. 220, 195 A. 2d 626 (1963). An unreported opinion of Judge RALPH L. FUSCO of the Superior Court of New Jersey is contained in Appendix B of Appellant's Jurisdictional Statement.

Statute Involved

The statute involved herein is Chapter 174 of New Jersey Pamphlet Laws of 1962:

"CHAPTER 174, LAWS OF 1962

CHAPTER 174

"A SUPPLEMENT to 'An Act concerning the sale and distribution of newspapers, magazines and other publications in certain cases, and supplementing subtitle 10 of Title 2A of the New Jersey Statutes,' approved June 7, 1955 (P.L. 1955, c. 48).

"BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

"1. (C. 2A:170-77.2a. Notice by retail dealer a bar to delivery.) No person, firm or corporation engaged in the business of distribution of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer not to send or deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication.

"2. (C. 2A:170-77.2b. Penalty for failure to comply with provisions of act). Any person, firm or corporation which fails to comply with the provisions of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500.00 or imprisonment for 30 days or both.

"3. (Note: Act effective.) This act shall take effect 45 days after enactment.

"Approved December 3, 1962."

Questions Presented

1. Is there any substantial federal question as to whether Chapter 174 of New Jersey Pamphlet Laws of 1962 violates the Constitutional Guaranty of Freedom of the Press?

2. Is there any substantial federal question as to whether Chapter 174 of New Jersey Pamphlet Laws of 1962 violates the Constitutional Guaranty of Equal Protection of the Law?

3. Is there any substantial federal question as to whether Chapter 174 of New Jersey Pamphlet Laws of 1962 deprives wholesale book and magazine distributors in New Jersey of liberty and property without due process of law?

Statement of the Case

Appellant, Hudson County News Company, Inc., is a New Jersey Corporation engaged in the wholesale distribution and sale of newspapers, books and magazines in the northern New Jersey Counties of Essex and Hudson. Appellees are the State of New Jersey, the Attorney General of the State of New Jersey and the County Prosecutors of the two aforementioned Counties.

The Prosecutor's office of Hudson County sometime subsequent to the enactment of 1962, N. J. P. L., Ch. 174, sent a printed announcement to Hudson County News Company, Inc., inviting it to attend "a conference of the clergy, laity representatives, retail dealers and distributors relative to the new laws of the State of New Jersey concerning obscene publications and the sale and distribution of all magazines and publications."

Harold J. Ruvoldt, Acting Deputy Attorney General of New Jersey, Hudson County Division to Deter and Eliminate Obscene Literature, outlined the provisions of 1962 N. J. P. L., Ch. 174. Mr. Ruvoldt and Deputy Attorney General Frank A. Verga, Acting Prosecutor of Hudson County, announced the intention of the Prosecutor's Office to enforce the statute as it is the prosecutor's duty to enforce all laws.

On January 29th, 1963, a meeting was held at the Hudson County Prosecutor's Office, at the request of representatives of the appellant, at which time the Prosecutor's Office again expressed the intention of proceeding with the enforcement of the statute and forthwith prosecuting any alleged violations by plaintiff or others in Hudson County of the laws of the State of New Jersey.

On January 16, 1963, William S. Family, Chief of Police of the City of East Orange, Essex County, circulated a

letter to "all Newsdealers of East Orange" in which he requested their cooperation in connection with the prosecution of violations of the newly-enacted provisions of 1962 N. J. P. L., Ch. 174.

On February 9, 1963, the various appellees herein were served with a summons and complaint in which Hudson County News Company, Inc., as plaintiff, sought a declaratory judgment (pursuant to N.J.S. 2A:16-50 *et seq.*) that Chapter 174 of New Jersey Pamphlet Laws of 1962 was unconstitutional, illegal and invalid and also sought to restrain and enjoin the enforcement of that statute. All parties thereafter stipulated to all material facts and agreed to treat the matter as one for summary judgment under Revised Rule 4:38 of the New Jersey Rules of Court. Oral argument was had on February 25, 1963, before Honorable Ralph L. Fusco, Judge of the Superior Court of New Jersey, who held that the statute under attack was constitutional and valid, and the restraint sought was denied. An appeal was taken to the Appellate Division of the New Jersey Superior Court but before argument this was certified to the New Jersey Supreme Court. That Court affirmed the decision below and appellants now appeal from this determination.

ARGUMENT

There are no substantial federal questions involved. The New Jersey Supreme Court has correctly ruled that 1962 N. J. P. L. 174 does not infringe upon, or involve the violation of, any of the constitutional rights asserted by appellants.

Introduction

The statute in question is not "obscenity" legislation. In order to create constitutional issues for the purpose of seeking jurisdiction of this court, Appellants and *amicus curiae*, throughout their arguments have intimated or assumed that the sole purpose of the enactment of this statute was to suppress obscene literature. In this manner they seek to create alleged constitutional defects by virtue of the circumstances that non-obscene as well as obscene publications may be rejected by the retailer and because they as distributor may incur some financial burden in adjusting their business practices to the requirements of the Act. Thus, appellants argue, groups or private individuals may be enabled to precensor publications and restrain the free publication and distribution of even the most refined reading material by pressuring retailers not to handle, or to return, certain material arbitrarily selected as objectionable. They argue further the legislation places an arbitrary restriction on their business without due process of law and violates the constitutional guarantee of equal protection of the Laws.

In creating this smokescreen, appellants and *amicus curiae* have made various references to the original bill which was rejected by the Governor and revised in order to overcome the very defects which appellants now seek to attribute to the present legislation.

Early in its opinion, the New Jersey Supreme Court perceived that obscenity was not involved in the operation or effect of the legislation in question, and outlined the basic issue in this cause. It stated (A5):

> "In dealing with statutory enactments we seek their purpose and effect and in our search we freely avail ourselves of legislative history. See *N. J. Pharmaceutical Ass'n* v. *Furman*, 33 N. J. 121, 130 (1960); *Lloyd* v. *Vermeulen*, 22 N. J. 200, 206 (1956). Here the history clearly discloses the evils aimed at and the efforts to deal with them within constitutional limits. There is no doubt that the original bill was viewed by its sponsors as an additional weapon in the arsenal against obscenity. *But there is equally no doubt that the bill, as finally enacted, is not confined to and does not turn on any findings of obscenity.* It provides that when a distributor sends a particular publication of whatever nature to a retailer, despite earlier written direction to the contrary, the retailer may notify the distributor that he wants it picked up and, in such event, the distributor must do so promptly. *Absent any statute, elementary business moralities and decencies would require ready compliance by the distributor; the question before us is whether, in the circumstances at hand, the placing of the authority of the State behind those moralities and decencies violates any constitutional inhibitions.*" (Emphasis added.)

If the infringement of any constitutional rights are involved in the subject matter of the legislation in question, they are those of the retailers whom this statute was designed to protect. These retailers are not parties to the action and understandably have not participated in the attack on the statute. It is the retailers who, for many years, have been burdened with receiving unwanted publications from the distributors and who very well have constitutional

rights not to be forced to continuously accept them in the course of business. As stated by the New Jersey Supreme Court at A6:

> "* * * when unwanted publications are delivered to the retailer he is not only burdened with problems of handling and storage and fire hazards, but is also placed under financial burden since he is charged upon receipt of the publications and is not credited until their return. They might also have noted that continued receipt and possession by the retailer of the unwanted publications might place him in jeopardy of arrest by police authorities where the publications are deemed to have crossed the border into obscenity."

A thorough analysis of all of the points raised by appellants and of the complaint which they initially filed in the Superior Court of New Jersey as well as of the argument they asserted on cross motions for summary judgment, clearly shows that the fundamental objection which appellants have to this statute is that it may impose a financial burden on them if they are required by a retailer to take back publications which they delivered to him "accidentally", after he served them with notice he no longer wanted such publications, within two days as provided by the statute, instead of within one week, which appellants assert they would customarily do anyhow. Conceivably, if the statute simply provided that appellants take back the unwanted, "accidentally delivered" publications within one week instead of within two days, all of the constitutional arguments asserted by appellants would fail.

A. 1962 N. J. P. L. 174 does not restrain distribution of literature.

The words of the New Jersey Supreme Court clearly answer the argument set forth by appellants in Point A of their jurisdictional statement (A12):

"Chapter 174 contains no elements of precensorship. The distributor may, as heretofore, freely distribute his publications. He incurs no penalty for distributing a publication even after having received a written direction to the contrary. It is only when he is specifically called upon by the retailer to pick up the unwanted publication without charge that he comes under an obligation of promptness which, if willfully disregarded, may subject him to a penalty. It is difficult to see how this elemental and thoroughly decent obligation can in itself be viewed as an unconstitutional restriction on freedom of the press. The retailer admittedly has the unfettered freedom to reject any unordered publication. He may consider it obscene, objectionable though not obscene, or just not saleable. His right of rejection is absolute and the State's implementation of that right, in the carefully limited manner set forth in Chapter 174, may readily serve the stated legislative goals without infringing on any constitutional freedoms."

B. 1962 N. J. P. L. 174 does not restrict freedom of the press.

This case does not involve a violation, anticipated, or otherwise, of the constitutional guarantee of freedom of the press. It involves neither restrictions of distribution nor restrictions in publication.

As commented upon heretofore in sub-heading A, the appellant distributors may distribute whatever they please to whomever they please, so long as the person receiving the material desires it. In fact the statute imposes no penalty upon delivery even after a retailer has requested that this be discontinued. It is only upon the failure of the distributor, after subsequent notice from the retailer, to take back those materials which he had previously been requested in writing not to deliver, that a disorderly persons offense is committed. Appellant asserts that this is its

practice in the first place, and it appears to do otherwise by force or compulsion would infringe on the constitutional rights of retailers by requiring them to buy publications they did not desire.

Nor is freedom of publication in anyway restricted. Merely because the press has a constitutional right to print and publish what it pleases, it does not follow that they can force the public to buy and read their material. Appellants assume and describe issues that do not exist and refer to cases generally involving freedom of speech, in an attempt to lay the foundation for jurisdiction of this Court. Nevertheless, their basic involvement in the legislation in question is that it may be more expensive for them to conduct their business if they have to avoid making or correcting mistakes that should not occur initially.

Article I, Paragraph 6, of the *New Jersey Constitution* prohibits, *inter alia*, "passage of law to restrain or abridge the liberty of * * * the press." The statutes in issue are not violative of the New Jersey Constitution nor the United States Constitution privileges which are implemented in the Fourteenth Amendment as the express legislative purpose is to prevent delivery of "unwanted" materials to a retailer and not to curtail publication thereof. The onus, if any, our Legislature has seen fit to impose, is cast upon the retailers to notify distributors of those magazines and publications which *they* (retailers) desire to return.

The rights of free *speech* and *press*, of *assembly* and of *worship*, are fundamental, but they are not absolute. *State* v. *Corbisiero*, 67 N. J. Super. 170, 176 (Hudson Cty. Ct. 1961). * * * and *the right of free press and of free speech* * * * is subject to certain police power. *Evans* v. *LePore*, 26 N. J. Misc. 215, 217 (Sup. Ct. 1948). Here the newly enacted statute protects the retail businessman and the distributor. Apropos of the "clear and present danger" doc-

trine as related to the particular circumstances, Chief Justice Vinson said: "When the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity." *American Communication Ass'n* v. *Douds*, 339 U. S. 382, 70 S. Ct. 674, 683, 94 L. Ed. 925 (1950).

Clearly, N.J.S. 2A:170-77.2 (a) and N.J.S.A. 2A:170-77.2 (b) do not invade our cherished freedoms; but assure, under the authority of the state to impose valid police power regulations, the businessman of economic convenience in the operation of his business.

The free press is a bulwark of our democratic way of life and courts must be ever vigilant to curb insidious as well as candid attempts to restrict its vital public functions. However, where there is no such malevolent attempt and the governmental requirement is being fairly applied to all, including newspaper publishers, [or retailers and distributors as in the case at bar], courts find no impairment of the constitutional guaranty of freedom of press. *Absecon* v. *Vettese*, 13 N. J. 581, 586 (1953). See *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184, 66 S. Ct. 511, 514, 90 L. Ed. 607, 613 (1946); where the court noted that since "the press has business aspects it has no special immunity from laws applicable to business in general." See also *Associated Press* v. *National Lab. Rel. Bd.*, 301 U. S. 103, 132, 57 S. Ct. 650, 81 L. Ed. 953, 961 (1937); *Arizona Pub. C.* v. *O'Neil*, 22 F. Supp. 117 (D. C. D. Ariz. 1938), aff'd. 304 U. S. 543, 58 S. Ct. 950, 82 L. Ed. 1518 (1938); *Giragi* v. *Moore*, 48 Ariz. 33, 58 P. 2d 1249, 64 P. 2d 819, 110 A. L. R. 314 (1936), *appeal dismissed*, 301 U. S. 670, 57 S. Ct. 946, 81 L. Ed. 1334 (1937); *City of Corona* v. *Corona Daily Independent*, 115, Cal. App. 2d 382, 252 P. 2d 56 (1953), *certiorari* denied 74 S. Ct. 2 (1953).

The authority of the state to impose regulations in order to assure the businessman of economic convenience and security has never been regarded as inconsistent with basic liberties and freedoms but rather as one of the means of safeguarding the good order upon which sound business ultimately depends. See *Lane Distributors* v. *Tilton*, 7 N. J. 349 at pp. 366-369 (1951). This new statute is truly a valid exercise of police power for the health, safety and welfare of New Jersey businessmen and the New Jersey citizenry. *New Jersey Constitution*, Article IV, Section 1, par. 1; *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504, 179 A. 116 at 124 (E. & A. 1935).

Freedom of the press, as guaranteed by the First Amendment of the United States Constitution against abridgement by the federal government, is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by State action. *Joseph Burstyn, Inc.* v. *V. Wilson*, 343 U. S. 495, 72 S. Ct. 77, 96 L. Ed. 1098 (1952). In its historic connotation, the press comprehends every sort of publication, and the guarantee of a free press covers distribution as well as publication. *Lovell* v. *Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938). As Honorable RALPH L. FUSCO indicated in his oral opinion on March 14, 1963 (see B8a):

> "The issue is then whether there is an unlawful restraint on the distribution in question. It is difficult to determine wherein the prohibition lies. The plaintiff is not precluded from selling any or all magazines, newspapers, periodicals or other publications. It is not precluded from publishing or distributing, to those who want them any or all magazines, newspapers periodicals or other publications. A refusal to accept certain publications by retail dealers could not be considered as restricting plaintiff's freedom of the press;

therefore, it is doubtful if a statutory enactment which seeks to protect dealers in this respect can be a denial of the asserted constitutional right. There is no prohibition against publication or distribution to any retail dealers of any publications which it desires. The statute merely provides that retail dealers need not receive nor store unwanted publications.

C. 1962 N. J. P. L. 174 does not violate the constitutional guarantee of equal protection of the laws.

Appellants are in the business of distributing newspapers as well as books and magazines (Statement of Facts, Page 5). In effect therefore they argue that their constitutional guarantee of equal protection of the laws has been violated because the Legislature sought to regulate only some of the products they distribute, and they complain because it did not regulate them all. However, there is absolutely no indication that they are adversely affected in any manner because they are not more fully controlled.

The New Jersey Supreme Court assumed for the purposes of ruling on this issue that Chapter 174 was intended to exempt newspapers, and found that nonetheless such an exemption in nowise impairs the constitutional validity of the enactment (A13). See *Williamson* v. *Lee Optical of Okla.*, 348 U. S. 483 at 488-489, 99 L. Ed. 563 at 572-573 (1955); *N. J. Restaurant Ass'n* v. *Holderman*, 24 N. J. 295, 300, 301 (1957). The Court quoted at length from the opinion of Justice DOUGLAS in *Williamson* v. *Lee Optical of Okla., supra*:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141,

84 L. ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Oregon State Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570. The legislature may select one phase and hold and apply a remedy there, neglecting the other. *A. F. of L.* v. *American Sash & Door Co.*, 335 U. S. 538, 93 L. ed. 222, 69 S. Ct. 528, 260 6 A. L. R. 2d 481. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch," 348 U. S. at 489, 99 L. ed. at 573." (A14).

Appellants seek to cloak this issue by assuming the effect of the legislation is on obscene material only and argue that it exempts *obscene* newspapers but includes other *obscene* publications. Based on this, they conclude their constitutional rights are effected because there is no difference in the two that is reasonably related to the purposes of the act. As noted before the statute is not confined to and does not turn on any finding of obscenity. In practice, forced acceptance by retailers of materials distributed by appellant may not have included newspapers, which therefore did not require legislative attention. The measure of equal protection is the individual affected by the statute and under this law all distributors are treated equally. As noted by the New Jersey Supreme Court (A14a):

"Here the evils aimed at were primarily in the field of books and magazines. The Legislature had the clear right to confine itself to that field so long as it treated similarly circumstanced distributors in sim-

ilar fashion. There was no disparate treatment among the distributors. Within the well-accepted principles expressed in *Williamson*, there was patently no denial of equal protection. See *Two Guys From Harrison, Inc.* v. *Furman, supra*, 22 N. J. at 228-229, *Gundaker Central Motors* v. *Gassert*, 23 N. J. 71, 80-82 (1956); *Jamoneau* v. *Harner*, 16 N. J. 500, 519-521 (1954), cert. denied, 349 U. S. 904, 99 L. Ed. 1241 (1955)."

D. 1962 N. J. P. L. 174 does not create precensorship powers in the hands of private groups or individuals.

The argument set forth by appellant in Section D of its brief is grounded on an assumption that circumstances will now occur which would otherwise never develop, in which retailers reject materials they might desire to purchase, because of pressures which may be exerted by outside groups. There is no basis in any proof that this fear is a reality. Furthermore, the legislation in question does not create what appellants describe as the power of precensorship in private individuals or groups, for the same result may occur without the statute. Appellants claim that in practice, retailers rejected unwanted publications and they picked them up on a weekly basis instead of on two days notice before this legislation was passed. The pressures and resultant precensorship described by appellant could as well occur without this legislation, for the duties and sanctions imposed by the statute are directed to appellants, and offer no threat to retailers. If appellants are correct in stating that they cease to deliver certain materials at the request of retailers, and pick up within a week any materials they inadvertently do deliver, without the operation of the statute, it is difficult to see how the statute even affects them, except, perhaps, to require them to adopt more efficient business practices.

As noted by our New J rsey Supreme Court, this argument presents no substantial federal question (A13):

> "The plaintiff has suggested that future practices and pressures by public officials and private groups may be such that the retailer will not exercise any judgment of his own but will bow to their advance specifications, thus presenting a form of precensorship comparable to *Bantam Books* v. *Sullivan, supra.* That is not the situation before us and we therefore need not deal with it. The Supreme Court did not strike the statute in Bantam Books and our only concern at this time is with the validity of the statute and not with practices and pressures which may never materialize. See *Isolantit Inc.* v. *United Electrical, &c., of America*, 132 N. J. Eq. 613, 619 (E. & A. 1942); *State* v. *Bryce*, 56 N. J. Super. 83, 90 (App. Div. (1959)."

E. 1962 New Jersey Pamphlet Law 174 does not impose an arbitrary and oppressive restriction on a lawful business nor deprive appellant of liberty and property without due process of law.

As noted before, Appellant insists it is their policy to refrain from delivering any materials "if so requested by any dealer" and its practice is "to make a pickup once every week of all returns from retail dealers" (A4). Its sole practical objection to the legislation in question is that "if it were required to arrange for the pickup of particular unwanted publications as required by Chapter 174, it would be subjected to additional expenditures and its present method of distribution would be rendered 'economically unfeasible'" (A5).

New Jersey Pamphlet Law 174, 1962 does not outlaw, bar or prohibit the business conduct of the appellant. It

seeks to regulate certain business activity and is within the range of the State's discretion to promote business security in order to secure the general comfort, health and prosperity of the State. The State has a declared public policy to impose business regulations upon business conditions for the common good and welfare by means that are reasonable and appropriate to that end (See *Reingold* v. *Harper*, 6 N. J. 182 (1951). With this plain policy of protection of the basic interests of society in mind, the Legislature has sought to regulate the sale of magazines, periodicals and other publications in this State.

Our Federal and State Constitutions do not guarantee the unrestricted privilege to engage in business or conduct as one pleases. *Nebbia* v. *People of State of New York*, 291, U. S. 502, 78 L. Ed. 940 (1934); *Lane Distribution* v. *Tilton*, 7 N. J. 349 (1951). As noted earlier the practices which would be affected by this legislation are detrimental to the public welfare. When retailers receive unwanted publications they are burdened with problems of handling and storage as well as potential fire hazards. They are also placed under a financial burden since they are charged upon receipt of the publications and not credited until their return. In addition there is an obscenity regulation aspect to the legislation for continued receipt and possession by the retailer of unwanted publications could place him in jeopardy of arrest by police authorities, where the publications are deemed to have crossed the border into obscenity.

The statute was thoroughly analyzed in this respect by the New Jersey Supreme Court (A9-A10):

> "Paragraph 1 of Chapter 174 simply provides without penalty, that the distributor shall not send any particular publication to the retailer where he has received written direction from the retailer to the con-

trary. That such should be the policy of distribution may hardly be gain-said; the plaintiff's own complaint states that its policy has always been to refrain from delivering any particular publication, if so requested by the retailer. Paragraph 2 provides that if the distributor has sent a publication to the retailer despite written directions to the contrary, the retailer may notify him of that fact, in which event the distributor shall forthwith pick up the publication without charge. Here, again, it may not be disputed that such should be the policy and the plaintiff's own complaint asserts that its practice is to pick up returns although not as promptly as called for by the statute.

"The requirement of promptness is a fair one and the fact that its imposition may compel the plaintiff to alter its private business practices cannot serve to impair the constitutional validity of the statute. The plaintiff contends that the requirement of removal within two days is oppressive in that it would apply even where it 'inadvertently or by some act completely beyond its control' fails to effect its pickup. At oral argument the State disavowed any legislative intent to punish for inadvertence and agreed that the statute should be construed to apply only to willful failures to remove within the allotted time. This construction which we now adopt, is consistent with recent pronouncements which have justly sought to avoid the imposition of punishment for innocent default. See *State* v. *Hudson County News Co., supra*, 35 N. J. at 293; *cf. State* v. *Schlueter*, 127 N. J. L. 496, 499 (Sup. Ct. 1941)."

CONCLUSION

Appellant has raised no substantial Federal question which warrants the further attention of this Court and therefore it is respectfully urged that the instant appeal be dismissed, or in the alternative that the judgment of the New Jersey Supreme Court be affirmed.

Respectfully submitted,

ARTHUR J. SILLS,
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Attorney Pro Se and on Behalf of Respondents, State of New Jersey, Brendan T. Byrne and James A. Tumulty.

EVAN WILLIAM JAHOS,
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JOHN W. HAYDEN, JR.,
Deputy Attorney General,
Of Counsel and on the Brief.

SUPREME COURT, U. S.
JUN 17 1964
JOHN F. DAVIS, CLERK

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APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY TO MOTION TO DISMISS.

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REPLY TO MOTION TO DISMISS.

Reply to Respondents' Argument that there are no Substantial Federal Questions Involved.

The cornerstone of respondents' argument is the statement that "The statute in question is not 'obscenity' legislation" (R.B. 6, 7 and 14).

This position is completely contrary to the record. The following facts, uncontested by the respondents (p. 5a) sustain the opposite position; that the statute in question is obscenity legislation.

(1) The statute, in its original form, was drafted and recommended by *The Commission to Study Obscenity in Certain Publications* (A-2). After the original bill was vetoed by the Governor of New Jersey, it was amended, and enacted in its present form (pp. 83, 84a).

(2) The Statement accompanying the Statute stated its purpose as ". . . to prevent distributors from disseminating the increasing supply of *obscene publications* . . ." (p. 62a) (Emphasis added), and concluded that ". . . it is a hardship upon the retailer when material he finds unacceptable for sale by reason of its *obscene content or cover* . . ." is delivered to him (pp. 61a, 81a) (Emphasis added).

(3) The Hudson County Prosecutor, respondent, held a public meeting, described by him as ". . . a conference of the clergy lay representatives, retail dealers and distributors relative to the new laws of the State of New Jersey concerning *obscene publications* . . ." (A-4) (Emphasis added). One of the principal speakers at that meeting, Harold Ruvoldt, was announced in writing as Deputy Attorney General of New Jersey, Hudson County *Division to Deter and Eliminate Obscene Literature*" (p. 66a) (Emphasis added).

(4) Respondents, in their own brief, admit that this statute deals with obscenity:

> "In addition there is an obscenity regulation aspect to the legislation for continued receipt and possession by the retailer of unwanted publications could place him in jeopardy of arrest by police authorities, where the publications are deemed to have crossed the border into obscenity" (R.B. p. 17).

(5) The Supreme Court of New Jersey, in its decision, stated that "There is no doubt that the original bill was

viewed by its sponsors as an additional weapon in the "arsenal against obscenity" (A-5). The Court found that the Legislature, ". . . was concerned with obscenity and had undoubted power to deal with the subject" (A-9).

The conclusion is inescapable that this statute deals with obscenity. It is equally clear that the Legislature of New Jersey, by failing to limit the application of this statute to obscenity, has unreasonably restricted freedom of the press.

Conclusion.

For the reasons hereinabove set forth, we urge this Court to deny respondents' motion to dismiss, and to note probable jurisdiction of this appeal.

Respectfully submitted,

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